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No. 89-1895

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

ASTORIA FEDERAL SAVINGS AND LOAN ASSOCIATION,
Petitioner,

v.

ANGELO J. SOLIMINO,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council respectfully submits this brief amicus curiae on behalf of Astoria Federal Savings and Loan Association, seeking reversal of the decision below. The parties' written consents to file this brief have been filed with the Clerk of the Court.

INTEREST OF THE AMICUS CURIAE

The Equal Employment Advisory Council (EEAC or Council) is a voluntary association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes over 230 major U.S. corpora-

tions, as well as several associations which themselves have hundreds of corporate members. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives the Council a unique depth of understanding of the practical, as well as legal considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

As employers, EEAC's members, and the constituents of its association members, are subject to federal and state equal employment laws, including the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621 *et seq.* (1985). Thus, EEAC has a direct interest in the issue presented for the Court's consideration in the instant case, i.e., whether a judicially unreviewed state agency finding of no probable cause should be given preclusive effect, so as to bar a subsequent action in federal court under the Age Discrimination in Employment Act of 1967.

Because of its interest in the res judicata effect of prior state court and administrative decisions, EEAC filed amicus briefs in *University of Tennessee v. Elliott*, 478 U.S. 788 (1986), and *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982). In addition, EEAC has filed briefs as amicus curiae on numerous other occasions in this Court. *E.g.*, *Arizona Governing Committee v. Norris*, 463 U.S. 1073 (1983); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978); *International Brotherhood of Teamsters v. United States*, 431 U.S.

324 (1977), and *I.U.E. Local 790 v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976).

STATEMENT OF THE CASE

On March 5, 1982, plaintiff Angelo J. Solimino was terminated from his position as Vice President of the Mortgage Origination Department at Astoria Federal Savings and Loan Association. At the time of the termination, Solimino was 63 years old. Pet. App. A3.

On March 18, 1982, Solimino filed a formal charge of age discrimination with the federal Equal Employment Opportunity Commission (EEOC). The EEOC referred the case to the New York State Division of Human Rights ("DHR") pursuant to a work-sharing agreement.[1] Treating the case as a potential violation of both the ADEA and the New York State Human Rights Law, which also prohibits discrimination in employment, the DHR assigned the case to a Human Rights Specialist for thorough investigation. *Id.* Sixty days after the commencement of state age discrimination proceedings, Solimino elected to remain in

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[1] The EEOC Compliance Manual (CCH), § 5.2 provides in pertinent part: "EEOC awards annual contracts to process Title VII and ADEA charges to FEPAs that are designated as 706 agencies . . . and, under funding principles approved by the Commission, meet certain standards of capability, performance and compatibility with EEOC's charges investigation systems and methods."

The EEOC's conditions for deferring to state agencies include: a history of accepted findings by the EEOC, 29 C.F.R. § 1601.75(b)(1), (3); EEOC evaluation of the state agency's work product, *id.* § 1601.75(b)(2); reevaluation of the state agency's work product at least once every three years, *id.* § 1601.78(a); and reevaluation at any time on the EEOC's own motion, *id.* § 1601.78(c).

the state system, although at that time he had the right to withdraw from state proceedings and file an action in federal court. Throughout the state agency proceedings, Solimino was represented by counsel.

The DHR Human Rights Specialist issued an investigative report on October 5, 1982, in which the Specialist summarized the parties' arguments and submitted evidence, and on November 29, 1982, conducted a due process hearing. *Id.*

The hearing was attended by both parties. Each was represented by counsel. Each allegation in Solimino's charge was litigated at the hearing. Each party presented witnesses who gave sworn testimony, and both parties and their attorneys had the opportunity to examine and cross-examine witnesses and present all their arguments. *Id.* A full transcript of the proceedings was produced.

On January 25, 1983, the DHR dismissed the complaint, finding that no probable cause existed to believe that the alleged discrimination had occurred. *Id.* Solimino appealed the DHR's determination of no probable cause to the New York State Human Rights Appeal Board. After giving Solimino the opportunity to submit a brief and to present oral argument, the State Human Rights Appeal Board affirmed the DHR's determination on May 30, 1984. Solimino chose not to seek judicial review in the Appellate Division of the Supreme Court of New York. Pet. App. A4.

During the pendency of his appeal before the Human Rights Appeal Board, Solimino commenced an action on July 29, 1983, in New York State Supreme Court, New York County, against certain Astoria and DHR employees and Astoria's law firm for wrongful

termination, prima facie tort, perjury and conspiracy. The action did not explicitly seek judicial review of the DHR's finding dismissing Solimino's age discrimination claim. The Supreme Court dismissed the complaint against some defendants on April 16, 1984, and as to the remaining defendants on May 10, 1984. The Appellate Division affirmed those dismissals. *Solimino v. Drewitz*, 111 A.D.2d 602 (1st Dep't. 1985). Pet. App. A4.

On February 21, 1985, Solimino commenced this action against Astoria Federal in the United States District Court for the Eastern District of New York, alleging that, because of his age, Astoria denied him promotions and raises and terminated his employment. *Id.*

On February 23, 1989, Astoria moved for summary judgment on grounds that the suit was barred by the statute of limitations and that the DHR's prior judicially unreviewed finding that Solimino's treatment and termination were not due to age discrimination precluded Solimino's federal suit under the Age Discrimination in Employment Act of 1967 ("ADEA"). *Id.*

The district court granted Astoria Federal's motion for summary judgment on the administrative estoppel ground, while denying it on the statute of limitations ground. Pet. App. A18-A19.

The district court, having found nothing in the language or history of the ADEA that evinced a congressional intent to contravene the common-law rule of preclusion, adhered to the presumption that a judicially unreviewed state agency finding had preclusive effect in a subsequent ADEA action in federal court. Pet. App. A27-A28. The district court also

rejected Solimino's argument that the DHR hearing failed to meet the requirements of constitutional due process, holding that the agency obviously was acting in a judicial capacity and the parties, each represented by counsel, had an adequate opportunity to litigate the factual disputes. Pet. App. A28. Lastly, the District Court held that the DHR finding bound the Court. Pet. App. A29.

The United States Court of Appeals for the Second Circuit reversed, holding that the judicially unreviewed state agency finding of no discrimination should have no preclusive effect in a federal court action under the Age Discrimination in Employment Act of 1967, and remanded the case for further proceedings. Pet. App. A6, A13.

SUMMARY OF ARGUMENT

Application of the reasoning of this Court's decision in *University of Tennessee v. Elliott*, 478 U.S. 788 (1986), to the Age Discrimination in Employment Act compels the conclusion that the New York State DHR's findings rejecting the plaintiff's age discrimination claims precluded his federal suit under the ADEA.

In *Elliott*, this Court recognized that it is "sound policy" to give state administrative agency findings preclusive effect in federal court proceedings where, as here, the state agency that made those findings acted in a judicial capacity and afforded the parties a full and fair hearing. *Id.* at 797-798, *citing United States v. Utah Construction & Mining Co.*, 384 U.S. 394 (1966), *and Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 484-85 n. 26 (1982). Accordingly, while it also noted in *Elliott* that Congress may

decide in enacting a particular statute that "other values outweigh the policy of according finality to state administrative factfinding," 478 U.S. at 799 n. 7, this Court declined to "create an exception to the general rules of preclusion" in the absence of some clear expression of congressional intent to do so. *Id.* at 798.

In holding in *Elliott* that unreviewed state agency findings did not have preclusive effect on claims under Title VII, this Court relied on a specific provision of Title VII—Section 2000e-5(b)—that has no counterpart in the ADEA. That section requires the federal Equal Employment Opportunity Commission to give "substantial weight" to state administrative decisions, and this Court reasoned that it would have made "little sense for Congress to write such a provision if state agency findings were entitled to preclusive effect in Title VII actions in federal court." 478 U.S. at 795.

Since the ADEA contains no provision similar to the "substantial weight" provision of Title VII, however, the only portion of the *Elliott* decision that is directly relevant to this case is the part that spells out the reasons for the Court's separate holding that unreviewed state agency findings do have preclusive effect with respect to claims under 42 U.S.C. § 1983. That part of the Court's opinion makes clear that "general rules of preclusion" are to be applied unless there is express language in a statute or its legislative history that " 'in [a] clear way suggest[s] that Congress intended to repeal or restrict the traditional doctrines of preclusion.' " *Id.* at 797, *quoting Allen v. McCurry*, 449 U.S. 90, 97-98 (1988).

The absence of any counterpart in the ADEA to the "substantial weight" provision of Title VII goes

far toward establishing that Congress did not intend to bar preclusion of ADEA claims. *Stillians v. State of Iowa*, 843 F.2d 276, 281 (8th Cir. 1988). For "[w]hen the only statutory language upon which the Court focused [in *Elliott*] is absent it seems illogical to infer an identical Congressional intent simply because other sections of the statutes may be similar." *Id.* at 281-82. But what is ultimately most telling is that, like Section 1983, the ADEA contains no affirmative indication whatsoever in its language or history that Congress intended to create an exception to general rules of preclusion. *Id.*

Moreover, as this case illustrates, no such exception is necessary to effect the ADEA's general aims and purposes. The plaintiff here made a deliberate tactical decision to pursue his age discrimination claims through the state administrative system until the state appeal board affirmed the DHR's rejection of his claims. He then chose not to seek judicial review of the agency's determination. As the Eighth Circuit recognized in *Stillians*, it would be "ludicrous" to give a plaintiff in such circumstances the additional choice of "filing suit anew in the federal district court," for to allow such a choice would reduce the state administrative proceeding to "nothing more than an opportunity for the [plaintiff] to test his case and practice his presentation." 843 F.2d at 282.

Because the plaintiff had a full and fair hearing and a chance to appeal, his situation can hardly be viewed as a predicament. But even if it could, it is one "of his own making." *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981). In the absence of a clear statutory mandate, this Court should not create for his benefit a new exception to the general rules of preclusion. Those rules serve "vital

public interests beyond any individual judge's ad hoc determination of the equities in a particular case." *Id.* "Public policy dictates that there be an end to litigation [and] that those who have contested an issue shall be bound by the results of the contest. . . ." *Id.* Thus, this Court has said repeatedly that "[t]here is simply 'no principle of law or equity which sanctions the rejection by a federal court of the salutary principle' " of preclusion. *Id.*, *quoting Heiser v. Woodruff*, 327 U.S. 726, 733 (1946). For the "mischief which would follow the establishment of precedent for so disregarding this salutary doctrine against prolonging strife would be greater than the benefit which would result from relieving some case of individual hardship." *Id.* at 402, *quoting Reed v. Allen*, 286 U.S. 191, 198-99 (1932).

ARGUMENT

I. ABSENT AN AFFIRMATIVE SHOWING OF CONGRESSIONAL INTENT TO CREATE AN EXCEPTION TO THE COMMON-LAW RULE OF PRECLUSION, JUDICIALLY UNREVIEWED STATE AGENCY DETERMINATIONS ARE ENTITLED TO PRECLUSIVE EFFECT WHERE THE STATE AGENCY ACTED IN A JUDICIAL CAPACITY AND AFFORDED THE PARTIES A FULL AND FAIR HEARING.

Recognizing that it is "sound policy" to apply principles of issue preclusion to the factfinding of administrative bodies acting in a judicial capacity, this Court has consistently applied federal common-law rules of preclusion in the absence of a governing statute unless Congress has expressly directed otherwise. *University of Tennessee v. Elliott*, 478 U.S. 788, 794-98 (1986).

In *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 485 (1982), this Court stated:

> In our system of jurisprudence the usual rule is that merits of a legal claim once decided in a court of competent jurisdiction are not subject to redetermination in another forum. Such a fundamental departure from traditional rules of preclusion, enacted into federal law, can be justified only if plainly stated by Congress.

Moreover, the Court noted, *id.* at n. 26, that this "usual rule" applies with full force to unreviewed findings of a state administrative agency where, as here, the agency acted in a judicial capacity and resolved disputed issues of fact properly before it which the parties had an adequate opportunity to litigate, citing *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 421-22 (1966).

In determining whether Congress intended to depart from these common-law principles, the Eighth Circuit in *Stillians v. State of Iowa*, 843 F.2d 276, 280-81 (8th Cir. 1988) (emphasis added), explained:

> When interpreting a statute we should not forget what existed before it was enacted. 'The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes the intent specific.' *Midlantic Nat'l Bank v. New Jersey Dep't. of Envtl. Protection*, 474 U.S. 494, 106 S.Ct. 755, 759-60, 88 L.Ed.2d 859 (1986). More explicitly, '[s]tatutes which invade the common-law . . . are to be read with a *presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.*' *Isbrandsten v. Johnson*, 343 U.S. 779, 783, 72 S.Ct. 1011, 1014, 96 L.Ed. 1294 (1952).

Indeed, this Court, ever since *Shaw v. North Pennsylvania R. Co.*, 101 U.S. 557 (1879), has recognized that statutes in derogation of the common law must be strictly construed.

The common-law principles of preclusion were firmly entrenched when the ADEA was enacted in 1967. Therefore, in construing the ADEA, a proper analysis begins with a presumption favoring the retention of those principles. Then, absent an "affirmative showing" of a "clear and manifest legislative purpose" to the contrary in the ADEA, *cf. Kremer*, 456 U.S. at 485, the common-law rule of preclusion applies.

II. THE DISTRICT COURT PROPERLY AFFORDED PRECLUSIVE EFFECT TO A JUDICIALLY UNREVIEWED STATE AGENCY DETERMINATION IN A SUBSEQUENT ACTION UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT.

A. The Reasoning of This Court's Decision in *University of Tennessee v. Elliott* Supports Application of the Usual Rules of Preclusion Under the ADEA.

This Court, in *University of Tennessee v. Elliott*, established a two-step approach for determining the common-law preclusive effect of judicially unreviewed state agency findings in federal court. First, the reviewing court must determine whether Congress, through the language and legislative history of the statute under which the federal claim is brought, expressed a clear intention to bar preclusive effect of the state administrative finding in federal court. *See* 478 U.S. at 797.

If Congress did not express an intent to bar preclusion, then the second step is for the court to determine whether the state administrative agency that

made the findings was acting in a judicial capacity, in a proceeding in which the litigants had an adequate opportunity to argue their claims. If so, the agency's findings are entitled to preclusive effect in federal court. *Id.* at 797-98. The resulting presumption favoring preclusive effect stems from res judicata principles of "enforcing repose". *Id.* at 798.

In *Elliott*, this Court held, with respect to Title VII cases, that Congress did not intend to give preclusive effect to judicially unreviewed findings of a state agency. Yet, with respect to Section 1983 cases, this Court reached the opposite conclusion. These differing holdings under two, substantively-overlapping federal employment discrimination statutes reflect the critical importance of a clear manifestation of congressional intent to "create an exception to general rules of preclusion." *Id.* at 797.

In examining Title VII, the Court found such a manifestation of intent in Section 2000e-5(b), which requires the federal EEOC to give "substantial weight" to state administrative decisions. That provision, the Court reasoned, would have made "little sense" if state agency findings were entitled to preclusive effect when a Title VII claim went on to a federal court. *Id.* at 795. In contrast, the Court found nothing in the language or legislative history of § 1983 which "remotely express[ed] any congressional intent to contravene the common-law rules of preclusion. . . ." *Id.* at 797 (quoting *Allen v. McCurry*, 449 U.S. 90, 97-98 (1980)).

In the instant case, then the paramount question is whether the ADEA, through its unique language and legislative history, manifests clear congressional intent to create an exception to the usual rule favoring retention of the common-law rule of preclusion. As

discussed below, nothing in the ADEA's language or enactment history remotely expresses any such congressional intent. Therefore, since there is no dispute that the other conditions for preclusion were met in this case—the plaintiff had a full opportunity to litigate his claims before an agency acting in a judicial capacity—the district court was correct in holding that the plaintiff's federal action was barred.

B. Congress Expressed No Intention in the Language or Legislative History of the ADEA to Bar Preclusion of Judicially Unreviewed State Agency Determinations.

The district court below, like the Eighth Circuit in *Stillians*, *supra*, properly applied the principles established by this Court in *Elliott*. As we show below, both the district court and the Eighth Circuit looked to the language and legislative history of the ADEA to determine whether Congress clearly intended to override the presumption favoring retention of the common-law rule of preclusion.[2]

1. *A Comparison of the ADEA and Title VII Yields Clear Evidence of Congressional Intent to Allow Preclusion of ADEA.*

As noted above, in declining to apply the usual common-law rules of preclusion with respect to Title VII claims, this Court in *Elliott* relied heavily on

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[2] In contrast, the Second Circuit below and the Seventh Circuit in *Duggan v. Board of Educ. of East Chicago Heights*, 818 F.2d 1291 (7th Cir. 1987), did not properly apply this Court's analysis in *Elliott*. Both of those courts failed to address the critical issue of whether Congress, through the language and legislative history unique to the ADEA, intended the ADEA to subrogate traditional rules of preclusion.

Section 2000e-5(b) of Title VII, which requires the EEOC to give substantial weight to state administrative decisions—a requirement which, the Court reasoned, would make no sense if such decisions had preclusive effect. 478 U.S. at 794. By contrast, this Court in *Elliott* found nothing in the language of Section 1983, like the "substantial weight" provision of Title VII, that manifested congressional intent to contravene common-law principles of preclusion. *Id.* at 798.

In applying the reasoning of *Elliott* to the ADEA, the Eighth Circuit correctly observed that the absence from the ADEA of a provision similar to Section 2000e-5(b) of Title VII "goes far toward resolving the issue before us." 843 F.2d at 281. This striking difference between Title VII and the ADEA strongly suggests congressional intent to distinguish the statutes, particularly because Title VII was already in effect and, in certain other respects, was used as a model when Congress enacted the ADEA. "When the only statutory language upon which the Court [in *Elliott*] focused is absent it seems illogical to infer an identical Congressional intent simply because other sections of the [ADEA and Title VII] may be similar." *Id.* at 281-82.

2. *The Language of the ADEA, by Its Plain Meaning, Does Not Rebut the Presumption Favoring Retention of the Common-Law Rule of Preclusion.*

"The meaning of the statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms." *Caminetti v. U.S.*, 242 U.S. 470 (1917). No provision in the ADEA, by its "plain meaning," bars the

application of the common-law rule of preclusion. If Congress had intended to bar preclusive effect of state agency determinations, it could easily have drafted a provision which stated as much. "If the result intended by Congress seems inconsistent with the overall objectives of the statutes, so be it. Only Congress legislates and only Congress can amend." *Stillians*, 843 F.2d at 280.

In fact, however, there is no inconsistency between the objectives of the ADEA and the principles of preclusion. The ADEA recognizes jurisdiction over age claims concurrently with state courts, giving the plaintiff the option of pursuing a federal claim if he elects to do so. Thus, in no way can it be said that precluding a later federal claim in any way forecloses an ADEA claimant from having his claim heard in federal court.

This Court in *Oscar Mayer* interpreted § 14(b) of the ADEA,[3] which defines the state-federal relationship in processing age discrimination claims, as requiring petitioners to file with appropriate state agencies, concluding:

> The ADEA permits concurrent rather than sequential state and federal administrative jurisdiction in order to expedite the processing of age-discrimination claims. . . . There is no reason to conclude, therefore, that the possibility of

[3] 29 U.S.C. § 633(b) provides, in pertinent part:

> In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated.

> concurrent state and federal cognizance supports the construction of § 14(b) that ADEA grievants may ignore state remedies altogether.

Oscar Mayer, 441 U.S. 750, 756 (1979).[4]

Moreover, the deferral mechanism of § 14(b) addresses the state authority's exclusive jurisdiction for sixty days to process complaints. This provision does not address preclusion directly. A deferral mechanism, however, does not indicate congressional intent to contravene the common-law rule of preclusion. This Court held in *Kremer v. Chemical Construction Corp.* with respect to Title VII's deferral provision:

> It is even more implausible to find an implied repeal [of 28 U.S.C. § 1738] in the limited deferral to pending state and local proceedings, § 706(c), 42 U.S.C. § 2000e-5(c). First, that provision does not even address the issue of the proper weight to be afforded state decisions. Moreover, . . . it is doubtful that Congress even contemplated that the provision applied after a complaint had run the full course of state administrative and judicial consideration.

456 U.S. 461, 471, n.8 (1982).

In addition, the § 14(b) deferral provision is consistent with the common-law rule of preclusion. The Eighth Circuit in *Stillians* provides the following example:

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[4] *Oscar Mayer* also stated: "[u]nless § 14(b) is to be stripped of all meaning, state agencies must be given at least some opportunity to solve problems of discrimination. While 60 days provides a limited time for the state agency to act, that was a decision for Congress to make and Congress apparently thought it sufficient." 441 U.S. at 757.

For example, after the sixty-day period required by 29 U.S.C. § 633(b), the petitioner may supersede any further state proceedings by filing suit in federal court. 29 U.S.C. § 633(a). Given that the petitioner has the discretion to forego state remedies in favor of a federal lawsuit, *it is not at all unfair to require the petitioner to live with his decision. If the petitioner chooses to remain in the state system and loses at the administrative level it seems ludicrous to give him the choice of either appealing to the state courts and thereby being barred in federal court by 28 U.S.C. § 1738, or filing suit anew in the federal district court.* Were we to allow such a choice the state administrative proceeding would be reduced to nothing more than an opportunity for the petitioner to test his case and practice his presentation. *Cf. Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 478, 102 S.Ct. 1883, 1895, 72 L.Ed.2d 262 (1982) (giving finality to state court judgments increases parties' incentive to pursue review in state courts).

843 F.2d at 282 (emphasis added).

3. *The Legislative History of the ADEA Does Not Overcome the Presumption Favoring Preclusion.*

Like the ADEA's language, the ADEA's legislative history is devoid of any clear indication of congressional intent to override the common-law rule of preclusion. Indeed, the legislative history is silent with respect to preclusion. Thus, applying the *Elliott* test, normal principles of preclusion must apply.

This Court in *Ex Parte Collett*, 337 U.S. 55 (1949), emphasized that

> [t]he plain words and meaning of a statute cannot be overcome by a legislative history, which

> through *strained processes of deduction* from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction. *Gemsco v. Walling*, 1945, 324 U.S. 244, 260, 65 S.Ct. 605, 614, 89 L.Ed.921. This cannon of construction has received consistent adherence in our decisions.

Id. at 61 (emphasis added).

Moreover, the Eighth Circuit stated:

> Ascertaining congressional intent is often a difficult endeavor. When a statute does not speak on an issue and the legislative history is silent, we are forced to decide between two conflicting results. Our decision should not be based on our opinion on what direction the statute should take. If the result intended by Congress seems inconsistent with the overall objectives of the statute, so be it. Only Congress legislates and only Congress can amend.

Stillians, 843 F.2d at 280 (emphasis added). Indeed, the Seventh Circuit in *Duggan* even acknowledged that the ADEA's legislative history does not help us decide which policies actually lie behind section § 633(b). 818 F.2d at 1296.

The Second Circuit below concluded that Congress enacted the ADEA in part because some state age discrimination laws were ineffective or inadequately enforced. 901 F.2d at 1151. However, this Court in *Kremer* recognized that "*New York's fair employment laws were referred to in the congressional debates by proponents of the legislation as an example of existing state legislation effectively combating employment discrimination.*" 456 U.S. at 473 (emphasis added).[5]

The Fourth and Ninth circuits have suggested that, in amending the ADEA, Congress found it unnecessary to reconsider issues previously resolved in Title VII debates. Under this analysis, the absence of ADEA legislative history does not necessarily refute congressional intent that ADEA and Title VII have comparable preclusive effect.[6]

There is, however, a serious flaw in this reasoning that an absence of debate proves congressional intent. First, it ignores the fact that the language of the two statutes differ, making it implausible that silence in the latter instance reflects a similar conclusion. Second, serious problems of reliability and relevance are raised by such an inference. Indeed, such an interpretation would be the result of "strained processes of deduction" that are clearly prohibited by this Court's decision in *Ex Parte Collett.* 337 U.S. at 61.

Often statutes are the result of strategy and tactics. Debate may be kept to a minimum in order to

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[5] This Court in *Kremer*, 456 U.S. at 473, n.13, relied on the following legislative history: 110 Cong. Rec. 1635-1636 (1964), reprinted in 1964 Leg. Hist. 3345-3346 (remarks of Cong. Reid) ("The New York State Commission for Human Rights has pioneered effectively and it has now been copied in 22 States . . ."); 110 Cong. Rec. 1643 (1964), 1964 Leg. Hist. 3258-3259 (remarks of Cong. Ryan); 110 Cong. Rec. 12595 (1964), 1964 Leg. Hist. 3066 (remarks of Sen. Clark).

[6] See *Rosenfeld v. Department of the Army*, 769 F.2d 237, 240 (4th Cir. 1985) (holding Title VII's bar of administrative preclusion applies to ADEA); *Nabors v. United States*, 568 F.2d 657, 660 (9th Cir. 1978) (ADEA entitles federal employees to trial de novo).

achieve consensus and advance the bill. Moreover, pertinent discussion may simply be unrecorded or inadequately preserved, making reconstruction of what actually transpired in hopes of deciphering congressional intent impossible. When Congress leaves little material from which to gather its intent, mere speculation is improper.

III. PUBLIC POLICY IS NOT SERVED BY ESTABLISHING A PRECEDENT FOR DISREGARDING ORDINARY RULES OF PRECLUSION IN THE ABSENCE OF A CLEAR CONGRESSIONAL MANDATE TO DO SO.

A. Giving Preclusive Effect to the Factfinding of a State Administrative Tribunal Serves the Values of Avoiding the Cost and Vexation of Multiple Litigation, Judicial Economy and Federalism.

This Court in *Elliott* recognized that "it is sound policy to apply principles of issue preclusion to the factfinding of administrative bodies acting in a judicial capacity." 478 U.S. at 798. The Court stressed:

> [G]iving preclusive effect to administrative factfinding serves the value underlying general principles of collateral estoppel: enforcing repose. This value, which encompasses both the parties' interest in avoiding the cost and vexation of repetitive litigation and the public's interest in conserving judicial resources, *Allen v. McCurry*, 449 U.S. at 94, 101 S.Ct., at 414, is equally implicated *whether factfinding is done by a federal or state agency.*

478 U.S. at 798 (emphasis added). Furthermore, the Court stated that "having federal courts give preclusive effect to the factfinding of state administrative tribunals also serves the value of federalism. *Id.* "There is no overriding federal policy that dis-

crimination claims be heard in federal court." *Stillians*, 843 F.2d at 282.

Since the plaintiff in this case had the opportunity to forego state remedies in favor of a federal lawsuit, it is not unfair to require him to live with his decision. *Id.* To hold otherwise would reduce the state administrative proceedings and determination to "nothing more than an opportunity for the [plaintiff] to test his case and practice his presentation." *Id.*

B. No Principle of Law or Equity Sanctions the Rejection by a Federal Court of the Principles of Res Judicata and Preclusion.

This Court in *Federated Dept. Stores* v. *Moitie*, 452 U.S. 394, 401 (1981), reasoned:

> [W]e do not see the grave injustice which would be done by the application of accepted principles of res judicata. *'Simple justice' is achieved when a complex body of law developed over a period of years is evenhandedly applied.* The doctrine of res judicata serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case. There is simply 'no principle of law or equity which sanctions the rejection by a federal court of the salutory principles of res judicata.' *Heiser v. Woodruff*, 327 U.S. 726, 773, 66 S.Ct. 853, 856, 90 L.Ed. 970 (1946) . . . This court has long recognized that '[p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties.' *Baldwin v. Traveling Men's Assn.*, 283 U.S. 522, 525, 51 S.Ct. 517, 518, 75 L.Ed. 1244 (1931).

Furthermore, the Court urged:

> We have stressed that '[the] doctrine of res judicata is not a mere matter of practice or procedure inherited from a more technical time than ours. *It is a rule of fundamental and substantial justice*, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts . . .' *Hart Steel Co. v Railroad Supply Co.*, 244 U.S. 294, 299, 37 S.Ct. 506, 507, 61 L.Ed. 1148 (1917). The language used by this Court half a century ago is even more compelling *in light of today's crowded dockets:*
>
> > 'The predicament in which respondent finds himself is of his own making. . . . [W]e cannot be expected, for his sole relief, to upset the general and well-established doctrine of res judicata, conceived in the light of the maxim that the interest of the state requires that there be an end to litigation—a maxim which comports with common sense as well as public policy.'

Id. at 401-02 (emphasis added).

Public policy would not be served by setting a precedent for disregarding the fundamental and long-standing rules of preclusion. In the instant case, the plaintiff made a tactical decision to remain in state administrative proceedings and forego judicial review of the state agency determination. He has had an adequate opportunity to litigate age discrimination issues, and he should be required to live with that decision.

The situation in which the plaintiff finds himself can scarcely be described as a "predicament." He has had a full and fair hearing and an opportunity

to appeal. But it is a situation "of his own making." In these circumstances, "the mischief which would follow the establishment of precedent for so disregarding this salutary doctrine against prolonging strife would be greater than the benefit which would result from relieving some case of individual hardship.' *Reed v. Allen*, 286 U.S., at 198-199, 52 S.Ct., at 533." *Id.* at 402. Another opportunity to litigate the same age discrimination issues is not required by the ADEA and should not be created by this Court.

CONCLUSION

For the foregoing reasons, EEAC respectfully submits that the judgment of the Second Circuit should be reversed.

Respectfully submitted,

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